Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-934

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

vs.

DONALD LEE STARR,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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COMMONWEALTH OF PENNSYLVANIA,
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vs.

DONALD LEE STARR,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

Opinions by Lower Court

1. May 11, 1976: Opinion of Shadle, P. J., refusing to suppress statements of the Respondent.

2. November 22, 1977: Opinion of Shadle, P. J., overruling and refusing Respondent's post-trial motions.

3. October 1, 1979: Opinion of the Supreme Court of Pennsylvania, reported at *Commonwealth v. Starr*, ... Pa. ...., 404 A.2d 388 (1979), two Justices dissenting, reversing the conviction of the Respondent on the basis that his confession was involuntarily given.

Jurisdiction

The judgment sought to be reviewed was rendered by the Pennsylvania Supreme Court on October 1, 1979, [*Commonwealth v. Starr*, ... Pa. ...., 404 A.2d 388 (1979)]. Title 28 of the United States Code § 1257(8) confers jurisdiction on the Honorable Court where the highest court of the state renders a final judgment where any title, right, privilege or immunity is specially set up or claimed under the Constitution of the United States.

This case was decided by the Pennsylvania Supreme Court, which is the highest and final appellate court in the Commonwealth.

A State Supreme Court decision directing a state Defendant to be retried is a final judgment from which the state could appeal to a Federal Supreme Court, since, in the event the Defendant were successful in obtaining an acquittal on retrial, the state would have no right to appeal. *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 604, rehearing den. 385 U.S. 890 (1966). In this regard, the instant case is directly on point with *Oregon v. Mathiason*, ... U.S. ...., 97 S Ct. 711, ... L.Ed.2d .... (1977). In that case, a judgment of sentence was reversed and remanded by the Oregon Supreme Court. The state appealed on the basis of an alleged Fifth Amendment violation and writ of certiorari was issued by the United States Supreme Court.

The instant case involves the invocation of the Fifth Amendment of the United States Constitution (self-incrimination) and likewise, the Fourteenth Amendment (making the Fifth Amendment applicable to the several states).

Constitutional Provisions Involved

Amendment V:

> "No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law, . . ."

Amendment XIV, Section 1:

> ". . .; nor shall any state deprive any person of life, liberty or property, without due process of law; . . ."

U.S.C.S.—Constitution, Amendments 5-End, page 444.

Question Presented for Review

Whether the polygraph examiner made certain representations regarding use of the polygraph and whether those representations rendered the subsequent confession voluntary?

Statement of the Case

The Respondent was charged with Criminal Homicide in the death of Wilbur Josiah Grim on March 2 or 3, 1975. The victim died from a stab wound.

The Respondent provided a confession to the Pennsylvania State Police after he failed a polygraph examination. This confession was the subject of a suppression hearing held on May 10, 1976. The court ruled that the confession was voluntary and could be introduced into evidence against the Respondent.

The Respondent was convicted of Murder in the Second Degree in a jury trial. He received a sentence of imprisonment for life, after post-trial motions were overruled and refused. He was sentenced on June 2, 1978. An appeal was taken to the Pennsylvania Supreme Court (Appendix iii). In an opinion dated October 1, 1979, (see Appendix iv), the Court reversed the judgment of sentence and remanded the case for a new trial, having suppressed the confession as involuntary.

ARGUMENT

Whether the polygraph examiner made certain representations regarding use of the polygraph and whether those representations rendered the subsequent confession voluntary?

The Pennsylvania Supreme Court held that the Commonwealth did not meet its burden of proving that certain representations made by a polygraph examiner to the Respondent did not impair his ability to knowingly and voluntarily waive his right to remain silent. The record of the suppression hearing does not, however, support such a holding.

Initially, the nature of representations made by the polygraph examiner must first be addressed. The Respondent's brief and position in appeals to the lower courts has been that that polygraph examiner indicated to him that the results of the polygraph examination could be admissible in court and could be used against him.

The record, however, does not support such a position. The Respondent, on direct, testified as follows:

> "A. (By Respondent): Then Kelly came into the room and laid the results of the test in front of me and said, 'I know you're lying, I could see you're lying right here.' He says, 'Do you notice any differences on the test with the paper?' And I showed him what I could see, and I don't know anything about how they read it. And then he pointed and said, 'Well, here's your strong point right here,' and showed me what the questions were, where they had them numbered on the paper. Then he told me, 'Look actually,' he says, 'as far as me being involved in this case, this is all I was involved in, is giving the test.' 'But,' he said, 'I don't really care, you don't have to say anything if you don't want to, but the thing is I can point it out right here; now, I'm a pro at this, and I can tell you

that you're lying.' And he told me that whether I said anything or not, it didn't really matter, that he'd be showing it to the District Attorney and the Judge.' 'And,' he said, 'when I show it to them, they're going to listen to what I have to say because they know I'm a pro at this.' So, right there, I figured, well, they got me.

Q. By this, did you understand them to mean that they could introduce this in court against you?

A. That's the way I took it, because as far as I was concerned, after he said that, I figured, well, they got me dead to rights."

(N/T, page 5, lines 15-28; page 6, lines 1-15)

However, in cross-examination by the Assistant District Attorney, the Respondent testified:

"Q. (By Assistant District Attorney): Did Trooper Kelly tell you that this polygraph test could be used in a court of law?

A. Not directly.

Q. He didn't tell you that?

A. Not directly, no; not in that way."

(N/T, page 14, lines 14-18)

When questioned by the Court, the respondent stated that when he met with the troopers, they informed him that he didn't have to say anything (N/T, page 16, lines 4-6).

"Q. Now, did you, at this time, before the test was administered, say anything to him about the possible use of the results of this test in court?

A. Yes, sir. When I give the rights form, I get into the third paragraph there that deals with the polygraph instrument specifically. I reiterate there. I read him those rights. And, by the way, when I read those rights, I interject the fact that anything he says can and will be used against him. Polygraph charts in all cases are not used in court. But I didn't want to mislead him, and I did relate to him that there are some circumstances where polygraphs have been admitted in court either by stipulation or court order or as an issue.

Q. Now, do you have personal knowledge of the fact that sometimes polygraph tests will be admitted into court?

A. Yes, sir, I have.

Q. And what type of knowledge is that?

A. I myself have testified in courts of record on the findings of polygraph, and my colleagues that I've gone to school with have, on some stipulated matters."

(N/T, page 20, lines 7-26)

More precisely, when further questioned by Assistant District Attorney Jones, the trooper responded as follows:

"Q. (By Mr. Jones): But, then, you did not say anything of the nature that the results of this test would be used in court or would be used to influence either the District Attorney or the Judge's opinion as to his guilt or innocence?

A. *No, sir.*"

(N/T, page 22, lines 18-28; page 23, lines 1-9)

Thus, taking both the testimony of the Respondent and the polygraph examiner, the record supports the Commonwealth's argument that the polygraph examiner did not indicate to the Respondent that the results of his particular polygraph examination could be used as evidence against him in court.

Even if the Court assumes the Defendant's allegations regarding the statements by the polygraph examiner, case law does not support the suppression of a confession subsequent to the statements made by the examiner in the instant case. The courts have consistently held that statements made to a suspect by a polygraph examiner after the test that he was not being truthful do *not* constitute improper coercion. *People v. Baretts*, 256 Cal. App.2d 392, 64 Cal. Rptr. 211 (1967); *State v. Clifton*, 271 Or. 177, 531 P.2d 256 (1975); *Commonwealth v. Hipple*, 333 Pa. 33, 3 A.2d 353 (1939). Such was the thrust of the statements made by Trooper Kelly.

Furthermore, the Courts have held that a trick or misrepresentation to a defendant does not automatically render inadmissible statements made thereafter. In the leading case referred to in the Pennsylvania Supreme Court's decision, *Commonwealth v. Jones*, the Supreme Court of Pennsylvania set forth the following guidelines

> "In the case at bar, we are not convinced that the alleged fabrication concerning the co-defendant's *confession was likely to cause an untrustworthy confession.* Nor do we find it so reprehensible as to invalidate the confessions as *offensive to basic notions* of fairness."
>
> *Commonwealth v. Jones*, 457 Pa. 423, 435, 322 A.2d 119 (1974).

See also *Frazier v. Cupp*, 394 U.S. 731, 739 (1969); *Commonwealth v. Baity*, 428 Pa. 306, 315, 237 A.2d 172 (1968).

The Court, in *Commonwealth v. Jones*, goes on to also state:

> ". . .we do not believe that a misrepresentation, even though intentional, as to the evidence available against him is the type of information that would so distort the factual situation confronting him as to render his waiving unknowingly and unintelligent."
>
> *Commonwealth v. Jones*, 457 Pa. 423, 435, 322 A.2d 119 (1974).

Again, referring to the record from the suppression hearing, Corporal Corbett, to whom the confession was made, testified as follows on cross-examination:

> "Q. And did he (meaning Trooper Kelly) pass that information on to Donald Starr? Did he say 'Here, I can see right here, you made a reaction; this indicates some stress; this indicates that perhaps you weren't giving a true indication of what happened?'

> A. Yes. He would very clearly indicate such and such a number, and he would tell Donald to find that number, and Donald would point it out himself; in other words, he was assisting Kelly, in agreeing.
>
> (N/T, page 28, lines 18-26)
>
> Q. Now, did trooper Kelly indicate in no uncertain terms to Mr. Starr that he could tell this both by having Mr. Starr point it out and by his own conversation with Mr. Starr?
>
> A. Yes. And, in fact, I remember Mr. Starr making the remark, after he started to explain and give the detailed account, that he knew that he was lying himself, because he could hear the needle hit the top or bottom of the machine."
>
> (N/T, page 29, lines 3-10)

Such a reaction by the Respondent is supportive of the position that the confession was indeed trustworthy.

As to whether statements by the polygraph examiner impaired Respondent's ability to knowingly and intelligently waive his right to remain silent was also addressed by the suppression court. It is important to note that the confession was made *not* to the polygraph examiner, but rather Corporal Corbett, who, after the polygraph examination and the alleged statements by the examiner, again fully advised the Respondent of his right to remain silent. The suppression court summarized Respondent's testimony as follows:

> "[D]efendant frankly admitted that he was fully advised of his constitutional rights, including the right to refuse to take the [polygraph] test and to refuse to answer any questions and to remain silent, both before and after the test was administered and before he made any subsequent statements, and that he was not coerced, intimidated or mistreated in any way."
>
> Order, Shadle, Jr., dated May 11, 1976.

Such frank admissions by the Respondent are clearly supportive of the conclusion that the confession was intelligently and voluntarily following advisement of his constitutional rights again after the test.

The suppression court based its decision on the evidence before him. Having done so, the decision of the suppression court was not reversible absent a clear abuse of discretion.

Petitioner submits that the Suppression court properly admitted the confession by the Respondent.

Conclusion

The Petitioner prays the Honorable Court to issue a writ of certiorari to the Pennsylvania Supreme Court in that the said Court improperly suppressed the confession of the Respondent.

Respectfully submitted,

JOHN C. UHLER,
District Attorney,

DOROTHY LIVADITIS,
Assistant District Attorney,

Attorneys for Petitioner.

Appendix i—Opinion in the Court of Common Pleas of York County, May 11, 1976

IN THE COURT OF COMMON PLEAS
of York County, Pennsylvania

COMMONWEALTH,

vs.

DONALD L. STARR, JR.

Criminal Action
No. 157 of 1976

Appearances:

Floyd A. Jones, Esquire, Assistant District Attorney, for Commonwealth.

John H. Chronister, Esquire, Public Defender, for Defendant.

Defendant seeks to suppress as evidence a confession given by him to police officers. The basis for his claim is his contention that the statement was induced by erroneous advice to him by a police officer that results of a polygraph test showing false answers made by him would be used against him.

We find the following facts:

On the day in question defendant requested his probation officer to accompany him to the State Police Barracks to be interviewed by the police. Once there, a police officer explained to him the manner in which the polygraph test would

be given, advised him of his constitutional rights, and inquired whether defendant was willing to take the test. Defendant indicated some reluctance to do so, but when pressed for a reason, did agree to the test which was administered. He also signed a paper stating that his participation in the test was voluntary. It is clear that he did in fact voluntarily submit to the test.

Thereafter the testing officer showed defendant the result of the test and pointed out to him that it indicated that some of his answers to crucial questions on issues of guilt were false. Either at this point, or at the conversation explaining the test before it was administered, defendant rather vaguely quoted the police officer as saying that if defendant gave false answers, the officer would show the results of the test to the District Attorney and to the Judge, who would accept his expertise in establishing that defendant's answers were false. Defendant claims that it was because of this representation that he was induced to give a confession. To the contrary, the police officer testified that he advised defendant only that there were some circumstances, such as by agreement of the parties, under which results of a polygraph test could be admitted in evidence in court.

It is unnecessary for us to resolve this conflict. Despite defendant's affirmative answer to his counsel's leading questions, it is perfectly clear, and we so find, that even on defendant's version the officer made no false representation that the result of the test could be offered in evidence against defendant at the trial of the case in court. On the contrary, the officer did no more than warn that the falsity of defendant's answers could be demonstrated by the test to the District Attorney and a Judge.

Furthermore, defendant frankly admitted that he was fully advised of his constitutional rights, including the right to refuse to take the test and to refuse to answer any questions and to remain silent, both before and after the test was administered and before he made any subsequent statements, and that he was not coerced, intimidated or mistreated in any way.

Finally, it has been clearly and repeatedly held that a trick or misrepresentation presented to a defendant does not per se render his confession involuntary, where such action is not offensive to basic notions of fairness, nor likely to cause an untrustworthy confession. The situation here does not meet either category. See *Com. v. Hipple*, 333 Pa. 33 (1939); *Com. v. Jones*, 341 Pa. 541 (1941); *Com. v. Baity*, 428 Pa. 306 (1968); *Frazier v. Cupp*, 394 U.S. 731 (1969). See also *Com. v. Jones*, 457 Pa. 423 (1974), wherein it is said:

> ". . . we do not believe that a misrepresentation, even though intertional, as to the evidence available against him is the type of information that would so distort the factual situation confronting him as to render his waiver unknowing and unintelligent."

We conclude that defendant's confession was intelligently and voluntarily given after full and complete advice as to his constitutional rights, that none of such rights were infringed, and that such confession is therefore admissible in evidence.

Appendix i—Opinion in the Court of Common Pleas of York County, May 11, 1976.

ORDER

AND NOW, TO WIT: This 11th day of May, 1976, defendant's application to suppress his confession as evidence is overruled and refused, and an exception is noted on his behalf.

The Clerk of Courts shall furnish copies hereof to counsel for both parties.

BY THE COURT,

ROBERT I. SHADLE,
President Judge.

Appendix ii—Opinion in the Court of Common Pleas of York County, November 22, 1977

IN THE COURT OF COMMON PLEAS
of York County, Pennsylvania

COMMONWEALTH,

vs.

DONALD L. STARR, JR.

Criminal Action
No. 157 of 1976

Appearances:

Donald L. Reihart, Esq., District Attorney, for Commonwealth.

John H. Chronister, Esq., Public Defender, for Defendant.

In a trial before the court without a jury defendant was convicted of murder of the second degree in the commission of a felony under the Crimes Code. He has filed post-trial motions which have been considered by the court en banc on behalf of which this opinion is filed.

By his motion in arrest of judgment and the first three assignments in his motion for a new trial, he contends that the evidence was insufficient to sustain the verdict, and that the verdict was contrary to the evidence, to the weight of the evidence, and to the law. In a comprehensive single-spaced three page opinion filed by the trial judge at the time of his

adjudication, he reviewed all the evidence which clearly supports the determination of guilt. Nothing profitably can be added to that opinion, which is hereby adopted and incorporated herein, and a copy thereof is attached hereto as an appendix.

By his fourth ground assigned in his motion for a new trial, defendant contends that the court erred in refusing his pretrial application to suppress his confession to the police which was admitted in evidence at trial. The basis for his contention is that the police misrepresented to him the admissibility at trial of the result of a polygraph test given to him prior to his confession. The results of the test itself, of course, were not admitted in evidence.

The opinion and order of the suppression hearing judge filed herein fully considered and disposed of defendant's contentions in this regard. Nothing profitably can be added thereto, the same is hereby adopted and incorporated herein, and a copy thereof is attached hereto as an appendix.

We conclude that defendant's post-trial motions are without merit.

BY THE COURT,

ROBERT I. SHADLE,
President Judge.

Dated: November 22, 1977

ORDER

IN THE COURT OF COMMON PLEAS
of York County, Pennsylvania

COMMONWEALTH,

vs.

DONALD L. STARR, JR.

Criminal Action
No. 157 of 1976

Appearances:

Donald L. Reihart, Esq., District Attorney, for Commonwealth.

John H. Chronister, Esq., Public Defender, for Defendant.

AND NOW, TO WIT: This 22nd day of November, 1977, defendant's motions for a new trial and in arrest of judgment are overruled and refused, and an exception is noted on his behalf.

Since the sentence is mandatory, no report of a presentence investigation is required.

It is ordered that the defendant be presented for sentence with his counsel before the Honorable Joseph E. Erb, the trial judge, on such date and time as Judge Erb shall direct.

Appendix ii—Opinion in the Court of Common Pleas of York County, November 22, 1977.

The Clerk of Courts shall furnish copies hereof to counsel for both parties.

BY THE COURT,

ROBERT I. SHADLE,
President Judge.

Appendix iii—Appeal of Respondent to Pennsylvania Supreme Court

NO. 24 MAY TERM 1978

Docketed in Supreme Court
Jun 6 1978
Middle District

IN THE COURT OF COMMON PLEAS
of York County, Pennsylvania

COMMONWEALTH OF PENNSYLVANIA,

vs.

DONALD L. STARR, JR.

---

157 Criminal Action 1976
Criminal Homicide

Notice is hereby given that Donald L. Starr, Jr., Defendant above named, hereby appeals to the Supreme Court of Pennsylvania from the judgment of sentence order entered in this matter on the 2nd day of June, 1978.

Received-Filed
Clerk of Courts
Jun 15 10 23 AM '78
Court House
York, Pa.

JOHN H. CHRONISTER,
John H. Chronister,
Assistant Public Defender,
York County Court House,
York, Pennsylvania 17401,
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Record Filed in Supreme Court
Oct 1 1978
Middle District

Appendix iv—Opinion in the Supreme Court of Pennsylvania, October 1, 1979

[J227]
IN THE SUPREME COURT OF PENNSYLVANIA
Middle District

COMMONWEALTH OF PENNSYLVANIA,

v.

DONALD L. STARR, JR.,

Appellant.

No. 24 May Term, 1978

Appeal, in *Forma Pauperis*, from the Judgment of Sentence of the Court of Common Pleas, Criminal of York County, at No. 157 C.A. 1976.

O'BRIEN, *J.*

Filed: Oct 1 1979

Appellant, Donald L. Starr, Jr., was tried by a judge sitting without a jury and convicted of murder of the second degree for the stabbing death of Wilbur Grim during a robbery. Post-verdict motions were denied and appellant was sentenced to life imprisonment. This appeal followed.

Appellant raises only one issue in this appeal. He alleges the trial court erred in refusing his pretrial motion to suppress his confession. The facts are as follows.

Once appellant became suspect in the instant homicide, he was asked to go to the state police barracks for purposes of taking a polygraph examination. Once at the barracks, appellant met with Trooper John B. Kelly, the polygraph examiner. Trooper Kelly explained how the test would be administered, and then fully informed appellant of his applicable constitutional rights. As Trooper Kelly testified:

> ". . . When I give the rights form, I get into the third paragraph there that deals with the polygraph instrument specifically. I reiterate there. I read him those rights. And, by the way, when I read those rights, I interject the fact that anything he says can and will be used against him. Polygraph charts in all cases are not used in court. But I didn't want to mislead him, and I did relate to him that there are some circumstances where polygraphs have been admitted in court either by stipulation or court order or as an issue. . . . "

Appellant was then asked if he would be willing to take the examination. He originally was somewhat reluctant to take the test. When Trooper Kelly questioned him as to why he was reluctant, appellant agreed to take the examination.

Following the examination, Kelly indicated to appellant that the results indicated deception on appellant's part when he denied participation in the Grim stabbing. Shortly thereafter, appellant was again informed of his constitutional rights, which he waived. He then admitted killing the victim in the course of a robbery.

However, appellant testified:

> ". . . Well, he started talking to me about the case, the seriousness of it. And then he brought up -- he said, 'I noticed on your test you reacted strongly to some of the

questions.' I said, 'Well, yeah, I'm kind of upset about it.' And we kept talking a little bit. Then Kelly came into the room and laid the results of the test in front of me and said, 'I know you're lying, I could see you're lying right here.' He says, 'Do you notice any differences on the test with the paper?' And I showed him what I could see, and I don't know anything about how they read it. And then he pointed and said, 'Well, here's your strong points right here,' and showed me what the questions were, where they had them numbered on the paper. Then he told me, 'Look, actually,' he says, 'as far as me being involved in this case, this is all I was involved in, is giving the test.' 'But,' he said, 'I don't really care, you don't have to say anything if you don't want to, but the thing is I can point it out right here; now, I'm a pro at this, and I can tell you that you're lying.' And he told me that whether I said anything or not, it didn't really matter, that he'd be showing it to the district attorney and the judge. 'And,' he said, 'when I show it to them, they're going to listen to what I have to say, because they know I'm a pro at this.' So, right there, I figured, well, they got me. . . ."

He then admitted killing the victim.

We note preliminarily the applicable test. "When the admissibility of a confession is challenged, the prosecution at the suppression hearing has the burden of proving that the defendant made a knowing and intelligent waiver of his rights when being questioned by the police; that waiver must be shown by a preponderance of the evidence." [Citations omitted].

"In deciding whether the burden has been met, we consider the testimony of the prosecution witnesses, and that portion of the evidence offered by the defense that remains uncontradicted." [Citations omitted]. *Commonwealth v. Jones*, 459 Pa. 286, 289, 328 A.2d 828, 829 (1974).

Appellant claimed the waiver of his *Miranda* rights was ineffective because Trooper Kelly's representations led appellant to believe the results of the polygraph examination could be used as evidence against him. The burden, thus, fell to the prosecution to demonstrate by a preponderance of the evidence that no such misleading representations were made.

The suppression court, approaching the heart of the matter, inquired of Trooper Kelly:

> "Q. [by the court] Could you have said something like his testimony, which was that after you showed the results of the test to the judge and to the district attorney, they would accept your word as a pro and they would know that he was lying? Could you have said something like that to him?
>
> "A. If I would have, the context of it would have been in the form of telling him that the charts speak for themselves, they could be checked by anyone, I have 100 percent confidence in the results of the testing, and anybody that reviewed them or checked them would have to agree, that was qualified and competent."

This equivocating answer by the Commonwealth's principal witness to the critical question of precisely what representations were made to appellant falls short of satisfying the burden which adhered to the prosecution. This is especially so where it is uncontradicted that *some* representations, at least, were made to appellant concerning the use to which the polygraph results might be put and the effect which they might have. The record of the suppression hearing does not indicate the Commonwealth met its burden of proving the representations made did not impinge with such force upon ap-

pellant's understanding of his right to remain silent so as to render his decision to waive that right a knowing and voluntary one.

Reversed and remanded for a new trial. Mr. Justice Nix files a dissenting opinion. Mr. Justice Larsen files a dissenting opinion.

DISSENTING OPINION

[J-227]

IN THE SUPREME COURT OF PENNSYLVANIA
Middle District

COMMONWEALTH OF PENNSYLVANIA,

v.

DONALD L. STARR, JR.,

Appellant.

No. 24 May Term, 1978

Appeal, in *Forma Pauperis*, from the Judgment of Sentence of the Court of Common Pleas, Criminal, of York County, at No. 157 C.A. 1976.

NIX, *J.*

Filed: Oct 1 1979

I am forced to vigorously register my dissent to today's Opinion of the Court. The majority Opinion entirely misreads, and accordingly fails to cite, our prior cases on the issue of the nature of the representations made to a defendant and that allegedly result in a confession. In *Commonwealth v. Jones*, 457 Pa 423, 435, 322 A.2d 119 (1974), this Court stated:

> "In the case at bar we are not convinced that the alleged fabrication concerning the co-defendant's confession was likely to cause an untrustworthy confession.

Nor do we find it so reprehensible as to invalidate the confession as offensive to basic notions of fairness." The United States Supreme Court recently considering a quite similar factual situation observed: "The fact that the police misrepresented the statements that [the co-defendant] had made is, while relevant, insufficient in our view to make this otherwise voluntary confession inadmissible." Frazier v. Cupp, 394 U.S. 731, 739 (1969); See also, Commonwealth v. Baity, 428 Pa. 306, 315, 237 A.2d 172 (1968) (Opinion of Mr. Justice Roberts); People v. Robinson, 31 App. Div. 724, 297 N.Y.S. 2d 82 (1968).

Nor do we believe that this subterfuge precluded the exercise of a knowing waiver. Of course, an accused must know the nature of his Constitutional rights and we caution that any misrepresentation which may cast doubt upon the accused's awareness of these rights would necessarily render the waiver suspect. However, in the case at bar, we are dealing not with a misrepresentation of rights, but with a misrepresentation concerning the amount of evidence against the accused. While we emphasize that we do not condone deliberate misrepresentation of facts supplied to an accused at a time when he must elect to waive a Constitutional right, we do not believe that a misrepresentation, even though intentional, as to the evidence available against him is the type of information that would so distort the factual situation confronting him as to render his waiver unknowing and unintelligent."

Today's Opinion stands the law on this issue upside down. The representations appellant alleges were made are not of the type or nature that would preclude the finding of a knowing or voluntary waiver.

I therefore dissent.

DISSENTING OPINION

J-227

IN THE SUPREME COURT OF PENNSYLVANIA

Middle District

COMMONWEALTH OF PENNSYLVANIA,

v.

DONALD L. STARR, JR.,

Appellant.

No. 24 May Term, 1978

Appeal, in *Forma Pauperis*, from the Judgment of Sentence of the Court of Common Pleas, Criminal, of York County, at No. 157 C. A. 1976.

JUSTICE ROLF LARSEN

Filed: Oct 1 - 1979

I dissent; a new trial is an unnecessary prolongation of this case.

Assuming appellant's version of the facts surrounding his confession (namely, that immediately prior to his confession, Trooper Kelly told him that "he'd be showing . . . [appellant's polygraph examination] to the district attorney and the judge"), Trooper Kelly's statement was not such that it was "likely to cause an untrustworthy confession" nor was it

"so reprehensible as to invalidate the confession as offensive to the basic notions of fairness." *Commonwealth v. Jones*, 457 Pa. 423, 435, 322 A.2d 119, 126 (1974).

In holding that appellant's confession was admissible, the suppression court found:

> . . . [D]efendant frankly admitted that he was fully advised of his constitutional rights, including the right to refuse to take the [polygraph] test and to refuse to answer any questions and to remain silent, both before and after the test was administered and before he made any subsequent statements, and that he was not coerced, intimidated or mistreated in any way.
>
> . . . .
>
> We conclude that defendant's confession was intelligently and voluntarily given after full and complete advice as to his constitutional rights, that none of such rights were infringed, and that such confession is therefore admissible in evidence.

The record supports the suppression court's findings and, therefore, I would affirm appellant's judgment of sentence.